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In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,

v.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY.

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v.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE UNITED STATES

AND

BRIEF FOR THE UNITED STATES UPON THE CROSS APPEAL.

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I.

BRIEF FOR THE UNITED STATES IN REPLY.

(1) As to the Effect of the Extension of Time.

The Cramp Company's brief (p. 3) appears to make a point of the fact that the extension of time was not made until December 4, 1895, fifteen days

after the vessel had been delivered, and that this extension was to that extent retroactive. It is hard to see why this should of itself constitute a ground of objection. Finding IV states:

> * * * and for that reason the time within which to complete the vessel, and thereby release the claimant from the penalties provided for in the ninth[a] paragraph of the contract, was on said date extended by the Secretary of the Navy a corresponding length of time, to wit, to November 19, 1895. (Rec., 19.)

This might perhaps have been better expressed, but it is perfectly clear that the extension of time was actually an extension in accordance with the provisions of the last paragraph of the ninth article of the contract, and the Cramp Company has never contended that it was anything else. There is nothing in that ninth article to require an extension of time to be made at any particular date, and it certainly could not be made until after the period of delay had come to an end and the Secretary had satisfied himself as to the cause of the delay. Whatever be the legal effect of the extension of time, the mere fact that it was necessarily made a few days after the period of delay ended is wholly immaterial.

The case of *Railroad Company* v. *Howard* (13 How., 307, 340; see Cramp brief, p. 3) held that the exercise of one party's right to annul a contract could not make the contract void *ab initio*, so as to deprive the other

[a] The record says "nineteenth," but it is the ninth paragraph or article which is referred to.

party of all remedy upon it for money then due or damages already sustained, but that doctrine has no real bearing upon the issue in the present case. The Government has not attempted to treat the present contract as void *ab initio*, but has merely extended the time for completion in accordance with the ninth article. Of course the Secretary's action in extending the time could not destroy any "vested rights of the Cramp Company," but to contend that the company had any vested right to damages on account of the delay is to beg the whole question of the meaning of the provision for an extension of time. If that provision was intended to prevent the existence of any right to damages on account of the delay, then no such right could ever have vested.

To hold that this provision was so intended is perfectly consistent with the words "shall *entitle* the party of the first part to a corresponding extension of the period." (See Cramp brief, p. 4.) The use of the word "entitle" serves to define the company's rights, and indicates that the extension of time is all that it is to be entitled to under the circumstances.

The case of *Mansfield* v. *New York Central Railroad Company* (102 N. Y., 206; see Cramp brief, pp. 5, 10) is essentially different from the present case. There the contract provided that the contractors should begin work within five days after notice that the foundations were ready, but the defendants had given this notice and had required

the work to begin before the foundations were actually ready, thereby increasing the cost of the work. This was not a matter of delay at all, and the contract, of course, contained no provision for the event of a willful violation of its terms, such as actually took place.

The cases of *Smith* v. *Railroad Company* (36 N. H., 458, 493) and *Sinnott* v. *Mullin* (82 Pa., 333) involved breaches of obligations necessarily implied in the respective contracts, and have nothing to do with an express provision for an extension of time. Similarly *Black* v. *Woodrow* (39 Md., 194) was a case where the defendant had prohibited and forcibly prevented the plaintiffs from completing the work, compelling them to remove their materials, and had then refused compensation on the ground that he had never promised to allow the building to be built according to the contract. It is hard to see what such an absurd defense has to do with the present case.

The Cramp Company's brief (pp. 6–7) criticises the suggestion made in the brief for the United States (pp. 10–11) that there might possibly be delays attributable to the United States other than those of the Navy Department. This suggestion was offered in explanation of certain peculiarities in the wording of the contract, but no argument whatever was based upon it, and it was expressly stated that it could not possibly affect the present case.

The Cramp brief (p. 6) contends that under the terms of the contract the Navy Department was bound to deliver the armor not only within the times and in the order required to complete the work in three years, but even to so deliver it that the vessel could be completed in as short a time as possible, so that the completion of the vessel in three years would not have relieved the Government from liability in case a speedier delivery of the armor would have led to an earlier completion. The meaning of a contract must be gathered from the contract as a whole, understood in the light of the circumstances attending its making and its performance. The third article makes it clear that the armor was not on hand, but was something which had to be made, and it is a matter of common knowledge that it could not be manufactured rapidly. The contractor was allowed ten months in which to make the working drawings and templates for the armor, and until they were furnished its manufacture could not be even begun. The Navy Department was required to deliver the armor "within the times and in the order required to carry on the work properly," but it was not necessarily required to deliver it at such time as would enable the vessel to be completed in less than three years. The reasonable construction of the third and ninth articles is that if the Navy Department was so fortunate as to be able to deliver the armor very early and the contractor was also able to finish its work before the expiration of the three years

the vessel would be delivered and accepted, which would be for the advantage of both parties, but neither party was to be liable for the fact that the vessel was not completed in less than three years.

On page 7 the Cramp brief contends that the only purpose served by the extension of time, if it served any, "was to enable the disbursing officer who paid the voucher to settle his accounts with the accounting officers of the Treasury." This attempted explanation of the provision for an extension of time is wholly inadequate. In the event of delays caused by "fire or water, or of any strike or standout of workmen employed in the construction" of the vessel, the disbursing officer who paid the voucher would have had to make matters clear to the acounting officers of the Treasury precisely as in the case of delays attributable to the Navy Department, and yet in the former case no extension of time was provided for, although no penalties could be deducted.

On the same page it is contended that the release of damages contained in the supplemental contract of May 10, 1894, itself shows that the extension of time was not intended to prevent the claim for damages on account of the delay. As the court below pointed out, no claim for loss or damage resulting from delay had at that time been presented and no extension of time had yet been made, so that the release was required by the Secretary as a precautionary measure to prevent the contractor from thereafter asserting such a claim as regards the delay

which had already occurred. It was impossible for the Secretary to foresee the future or to be certain that the vessel would be completed under such circumstances as to warrant an extension of the time, covering the whole period of delay, so that he may well have thought it necessary to prevent any question from arising in future as to liability for the delay which had already occurred.

The Secretary of the Navy's letter to Congress of December 8, 1896 (see Cramp brief, p. 8), can not possibly control in any way the interpretation of the contract as regards the extention of time. The contractor having undertaken to dispute the effect of that extension in a number of cases, involving in the aggregate a large sum of money, the question had become one of such importance as to demand a decision by the judicial branch of the Government, rather than by the executive or legislative. Under those circumstances the Secretary very properly expressed no official opinion upon the cases, but merely advised their reference to the Court of Claims.

In regard to the authorities cited on pages 10 and 11 of the Cramp Company's brief, it may be said in general that except as regards *Nelson* v. *Pickwick Associated Company*, *Lawson* v. *Wallasey Local Board*, and *Roberts* v. *The Bury Commissioners*, all of which are discussed in the brief for the United States (pp. 19–22), such of them as have any bearing whatever upon contracts to build, are ordinary cases of a breach

of contract on the part of the person for whom the work was to be done, and that they have nothing to do with the effect of an extension of time made in accordance with the terms of the contract. Thus in *New England Iron Company* v. *Gilbert Elevated Railroad Company* (91 N. Y., 153), the contract had been made to build an elevated railroad, but the party for whom the work was to be done chose to disregard the contract and to give the work to another, and it was held that the contract implied a promise that the plaintiff should have the work if it was to be done at all. The bearing of this case upon the present issue seems remote, but it is fairly illustrative of the authorities cited.

The criticism in the Cramp Company's brief (p. 11), that "the case of *Richard* v. *Clark* is at best *obiter*" is wholly unwarranted. The case had been tried before a jury, and while the judgment was reversed the appellate court may well have held that the plaintiff was entitled to lay his case before another jury, upon the basis of the law as laid down by the court upon the questions raised by the appeal, in case he saw fit to do so. The report (88 N. Y. Supp., 242) is too brief to indicate just why a new trial should have been ordered, but it must be assumed that the appellate court acted reasonably. One thing is certain, however, and that is that the law as laid down by that court was not *obiter*, but was necessarily controlling at any new trial.

(2) As to the Effect of the Final Release.

The Cramp Company's brief (pp. 12–13) contends that as the claim for damages was unliquidated, and consequently could not be entertained by the Secretary of the Navy, the final release could not have been meant to cover it. It is true that under the authorities the Secretary of the Navy had no authority to allow such a claim, although while the vessel was under construction during the period of delay he could have paid the increased cost incurred by the contractor for care and preservation during such period, had any request ever been made to him for such an arrangement. The inability to entertain a claim for unliquidated damages might have prevented the Secretary from obtaining a release of such damages in case the contract did not specifically provide for such release, but as the contract called for a release "of all claims of any kind or description under or by virtue of this contract," that language is sufficiently broad to cover claims which the Secretary was not authorized to settle, as well as those which came within his jurisdiction. The contract was not made with the Secretary alone, but with the United States, and hence whatever claims might arise under or by virtue of it would be claims against the United States. The limitations of the Secretary's power to settle any claims of any particular class could not prevent such claims from arising, and there would be just as much reason for requiring from the outset that the contractor should agree to ultimately release all such

claims as that he should agree to release any others. The object of the provision for a release was obviously to prevent the cost of the construction of the vessel from being increased by judgments afterwards recovered on claims for damages, and the words used do not admit of any distinction between one class of claims and another.

The inference sought to be drawn from *Coulter* v. *Board of Education* as an authority for sustaining the present judgment (Cramp brief, p. 14) is wholly unwarranted. The Coulter case held that the receipt alone, apart from the contract, would not have released the damages; but it was the receipt, taken in connection with the contract, which effected the release. So here the defense is not based upon the release by itself, but upon the contract which required the release, the payments under that contract being the consideration for all that the contractor was to do, including the execution of the release.

The case of *Fire Insurance Association* v. *Wickham* (141 U. S., 564; see Cramp brief, p. 15) can not affect a release made in pursuance of a contract expressly calling for a complete release as a condition of payment of the final installment of the consideration.

(3) As to the Item of Wharfage.

The Cramp Company's brief (p. 18) charges the counsel for the United States with *assuming* that the wharf where the *Indiana* lay was a part of the company's yard, but it is hard to see why the statement of

an undisputed fact should be called an assumption. The court below has not thought it necessary to state in so many words that the wharf where the *Indiana* lay was one of the wharves at the company's shipyard, but this was merely because it was never disputed that the *Indiana* was at the company's yard during the whole five years, as various portions of the record sufficiently indicate. For instance, Finding VIII (Rec., 21) gives a statement of the value of "the use of the claimant's yard, machinery, and tools, and for superintendence in the construction of the vessel," during the entire period of delay. If the vessel had not been at the company's yard, no portion of the cost of the upkeep of the yard could properly have been chargeable to it.

The opinion of the court below (Rec., 36), referring to its doubt as to the propriety of a charge for wharfage in view of the allowance made for the use of the yard, shows conclusively that it so understood that the wharf was at the company's yard. The company's brief admits that the company itself owned the wharf (p. 18, line 15), but the court's very reasonable doubt as to the propriety of a charge for wharfage was not based upon the mere ownership of the wharf, but upon the fact that it was one of the wharves of the yard.

II.

BRIEF UPON THE CROSS APPEAL.

A.—As to the Cramp Company's First Assignment of Error.

The Cramp Company was not entitled to a trial trip in the spring of 1894, and the United States should not be held liable for the cost of preparation for such a trip at that time.

The Cramp Company's brief (pp. 24–27) contends that the trial trip for which the company, on March 23, 1894, proposed to offer the *Indiana*, as stated in Finding XII (Rec., 22), was a trial trip under the third article of the contract, not under the tenth article, and that under the third article the company was entitled to a trial trip of the vessel at that time. It is submitted that this contention is not warranted by the facts. The provisions of the third article are these:

> *Provided, however,* and it is expressly understood, covenanted, and agreed, that if, upon the completion of said vessel, including hull, fittings, machinery, engines, boilers, and appurtenances, and equipment and all other work required under this contract, except the fitting, fixing, placing, and securing of the armor for her side belt, casemate, turrets, redoubts, barbettes, and conning tower, the party of the second part shall not have commenced the delivery of such armor to the party of the first part, then and in such case the vessel shall be subjected to the trial provided for in the tenth clause of this contract, and if, at and upon such

> trial, all the conditions and requirements relating thereto, except as to the fitting, fixing, placing, and securing of the armor for the side belt, casemate, turrets, redoubts, barbettes, and conning tower, shall be fulfilled, the vessel shall be accepted as provided for in the eleventh clause of this contract. (Rec., 7–8.)

Now the record shows that the casemate armor had all been delivered by May 1, 1893, the conning-tower tube by the same date, and the barbette armor by September 23, 1893. (Rec., 18). As there was no armor designated as "redoubt," this left only the turrets, side belt, and the conning-tower shield and covers undelivered (out of the armor specified in the third article), so that the conditions of that article, under which a trial trip could be demanded, did not exist. Even conceding that an unreasonable delay in continuing the delivery of the armor, after such delivery had begun, would have entitled the Cramp Company to demand a trial trip, it does not appear that there was any such unreasonable delay in this case. The side armor began to be delivered on August 13, 1894, only about three months after the date suggested by the Cramp Company for the trial trip and less than three months after the delivery of the ammunition tubes, and the findings do not state that this interval was inconsistent with due diligence in continuing the deliveries.

It is manifest that what this third article means is that if the Government found itself unable to supply the armor at all, within any reasonable time, the

contractor could go on and complete the vessel and be paid the entire cost, deducting only the cost of putting the armor in place. This article was not meant to provide for a mere delay in delivering the armor, but for a substantially total failure to deliver it altogether. The line between delay and total failure was to depend upon the date of the completion of the vessel in other respects—the date of "the completion of said vessel, including hull, fittings, machinery, engines, boilers, and appurtenances, and equipment, and all other work required under this contract, except the fitting, fixing, placing, and securing of the armor for her side belt, casemate, turrets, redoubts, barbettes, and conning tower." If *at that date* the Government had not *commenced* to deliver "the armor for her side belt, casemate, turrets, redoubts, barbettes, and conning tower," then the contractor was entitled to a trial trip, and if such trial showed that the conditions of the contract (except as to such armor) had been complied with, the vessel should be accepted, and also paid for, unless the delivery of such armor began within five months after the acceptance. If, on the other hand, the Government had, by the former date, *commenced* to deliver any of the armor specified, the contractor was not entitled to a trial trip until all the armor had been put in place and the vessel completed.

In other words, the contract contemplated the delivery of the vessel under one or other of two conditions, viz, either with all her armor or else without the "side belt, casemate, turrets, redoubts, barbettes,

and conning tower." If she were ready under the former, a trial trip would be made under the tenth article, while if she were ready under the latter, the trial trip would be made under the third article, and such trial trip, if successful, was to be followed by delivery and acceptance. The contract did not provide for a delivery of the vessel with a portion of the armor mentioned above, and hence as soon as the delivery of any of that armor began, the right to request a trial trip under the third article ceased to exist. It was apparently subject to revival in case the delivery of the armor was not continued with reasonable diligence, but that contingency did not arise here and may therefore be disregarded.

In the building of the *Indiana* the contingency which was to entitle the contractor to a trial trip under the third article never occurred. The armor referred to in the provision for such trial trip began to be delivered on March 16, 1893. This was late, it is true, but it was more than a year before the vessel approached such a state of completion (irrespective of armor) that a trial trip would have been possible. What the Cramp Company requested in March, 1894, was therefore not a trial trip under the third article, but something for which the contract did not provide, viz, an anticipation of the trial trip under the tenth article, the vessel being fitted with a portion of her armor, but not with the whole.

Finding XII (Rec., 22) does not state the facts in precise chronological order, nor quite as fully as might be desirable, but a general idea of what took

place may be gathered from it. On March 9, 1894, the Secretary of the Navy wrote the Cramp Company a letter in which he apparently assumed that the trial of the *Indiana* would take place at an early date and that the company was probably making preparations for it, and he requested the company to confer with certain officers in regard to the expenses. While this is the first communication on the subject which the court has seen fit to incorporate in the finding, it must not be inferred that the Secretary originated the idea of such a trial trip. On the contrary, the reference to the preparations which the company was probably making shows that it must itself have brought the matter up at an earlier date. On March 23, 1894, the company gave formal notice "that the vessel, other than the fitting of the armor, had reached a stage of completion ready for an official trial," and it "proposed to offer said vessel therefor between May 1 and 10 following."

The Secretary did not immediately reply to this proposal, being "in doubt as to whether the vessel was ready for such official trial," and he therefore appointed a board of officers to ascertain the fact. This board, on April 18, 1894, reported that the hull of the vessel was about 84 per cent completed, that but half the armor had been fitted in place, and that "the vessel was not then and would not be by May 1, 1894, ready for the official trial trip in accordance with the tenth article of the contract, and that such trial should not, in the interest of the Government, take place until the vessel was fully completed and

ready for delivery." Thereupon the Secretary refused to permit the trial trip.

The Cramp Company's brief disputes the reasonableness of the Secretary's action, but it is submitted that as a trial trip under the conditions proposed would have involved a departure from the terms of the contract, the decision was wholly within the Secretary's discretion, and its propriety is therefore not open to question. Even if the abstract reasonableness of his action could be considered, the opinion of a board of competent officers may properly outweigh the assertions of the company's counsel. The brief (p. 26) refers to the eleventh article of the contract as if that article contemplated a final trial of the vessel without all of her armor, but it is submitted that something very different was meant. That article manifestly refers to a final trial of the vessel with all her armor in place (see Rec., 11, lines 6 to 3 from foot), and it merely provides for the event of her not being fully "armed," i. e., supplied with all her guns. In that event she was to be "weighted correspondingly" (Rec., 12, line 23), but the trial of a vessel without some, or even without any, of her guns is obviously a different matter from a trial without a portion of her armor, which is really a part of her upper structure.

The only possible criticism that can fairly be made is that the Secretary might have appointed the board of officers six weeks sooner, when the Cramp Company first brought the matter up. That this would have been better may be conceded; but it is equally true

that as the proposed trip would have been useless the claimant ought not to have suggested it. The initial error was the claimant's, and it does not appear that the Secretary was at all aware how useless a trial trip would be until after the board reported. It seems that the claimant's original suggestion misled the Secretary into supposing that a trial trip might be useful. Under the circumstances the claimant ought to have asked, in the first instance, that a board should be appointed to ascertain whether a trial trip would be useful or not. As the Cramp Company did not take this necessary precaution, it ought fairly to assume all the consequences of its failure to do so. Its position is analogous to that of a person chargeable with contributory negligence.

This item, be it observed, differs from all the other items in this case, in that the loss alleged was not, strictly speaking, due to delay, but merely to an error of judgment on the Secretary's part in not acting more promptly in formally refusing to authorize a trial trip. This error of judgment had nothing to do with the contract, for the contract did not provide for a trial trip until the vessel was "completed and ready for delivery." The contractor proposed a trial trip outside the terms of the contract, and the Secretary was at first misled into an informal acquiescence. Under the doctrine of *Lee* v. *Monroe* (7 Cranch, 366), *The Floyd Acceptances* (7 Wall., 666), and *Whiteside* v. *United States* (93 U. S., 247), such an error in judgment on the Secretary's part can not impose a liability upon the United States.

This latter point was fully recognized by the court below (see opinion, Rec., 37), which rightly held, however, that the Cramp Company could not be regarded as having been misled and injured by the Secretary's failure to announce an immediate refusal, because the company was bound to know that under the terms of the contract the offer of the vessel for trial at that time was premature.

B. As to the Cramp Company's Second Assignment of Error.

The release of damages contained in the supplemental agreement of May 10, 1894, was made for a new and valuable consideration, and should be given full effect.

Finding V (Rec., 19) states the facts in regard to this release, which the court below properly held to be binding. The consideration was the payment of $234,830 some eighteen months before it was legally due. The contract had provided for payment "in thirty equal installments, as the work progresses, with a reservation of 10 per cent from each installment" (Rec., 15). By May, 1894, it was evident that the vessel could not be completed for some time yet, and therefore the Cramp Company wished to receive some of the money which the contract required should be reserved to be paid on final completion. While this money was not yet legally due, the amount of the retained percentages was thought to be more than was required to protect the Government against loss, and hence the Secretary of the Navy agreed to pay

the Cramp Company $234,830, being an amount equal to the retained percentages on the first twenty-three installments, and in consideration of this advanced payment the company released the Government "from all and every claim for loss or damage hitherto sustained by reason of any failure on the part of the [Government] to comply with this contract." The court below held that this provision for a release

> * * * must be treated as a precautionary measure by the Secretary to prevent the claimant from thereafter asserting such claim. Such provisions are common, especially in the modification of contracts where one party seeks to obtain a benefit thereunder in advance of the time specified for in the contract, and it would not do to say that such precautionary measures by executive officers are not within their jurisdiction or that such contracts are in their nature the settlement of unliquidated claims. (Rec., 35.)

This view of the court below is manifestly reasonable. The release was given for a new and valuable consideration, viz, the payment of a large sum of money nearly eighteen months before it was due under the terms of the contract. The total price to be paid for the vessel was $3,063,000 and whatever speed premium it might earn. Of this sum twenty-seven thirtieths, or $2,756,700, had already been earned, and $2,481,030 paid, leaving $275,670 in reserve. Three more installments, or $306,300,

remained to be earned, but no part of the $275,670 held in reserve could be paid until after preliminary or conditional acceptance of the vessel, an event which did not take place until November 19, 1895. Under this supplemental contract the greater part of this reserve, viz, $234,830, was paid seventeen months before it was due. The mere interest on $234,830 for seventeen months saved to the contractor by this payment amounts to $19,960.55, apart from the fact that the use of money is sometimes worth even more than the legal interest on it. Surely this advance payment was a good consideration. As a matter of fact, the entire damages due to delay before May 10, 1894, as computed by the court below, only amount to $42,263.55, a little more than double the amount of the interest saved to the contractor by this advance payment. In view of the uncertainties of the case, an advance payment which enabled the contractor to save $19,960.55 in interest before November 19, 1895, was worth a release of possible damages, ultimately fixed at $42,263.55, but (as the event has proved) not recoverable for over a dozen years. At all events there was a valid consideration, whether small or great, which the contractor agreed to take for the release.

It was reasonable that such a release should then be given, both because the full extension of the time for completion had not yet taken place, and also (without regard to the possible effect of an ultimate

extension of the time for completion) because this release was the only consideration which the company could offer for the change in the contract and the advanced payment of this sum of money. The fact that this agreement required security to be given against loss or injury by reason of the payment does not affect the point that the money was paid before it was due under the contract, and that it constituted a consideration for the release. A payment, to constitute a consideration, does not have to be absolute, and the fact that the Government might, under certain conditions which never arose, have called for a refund of the money paid does not overcome the fact that the Cramp Company received $234,830 some seventeen months earlier than it was entitled to receive it under the contract, or the further fact that the company agreed to make the release in consideration of such advanced payment.

The Cramp Company's brief contends that the release is void, because there was no consideration for it. In this connection the brief charges the court below with "entirely overlooking the trial trip provided for in the third article." It is submitted that the court below did not overlook that article; it merely realized that the company was not entitled to the trial trip which it had asked for, either under the third article or under the tenth, as the conditions actually existing did not warrant a trial trip under either of those articles. The company's brief also charges that the finding of the court below—that on May 10, 1894, the Secretary of the Navy had

not finally decided the cause of the delay—is erroneous, and it insists that the responsibility for delay was as well known to them then as now. The *cause* of the delay was undoubtedly as well known in May, 1894, as it is to-day, but the Government's legal responsibility was not then known, and in fact it can not be known until the present case is decided.

The contention that the Cramp Company was entitled to the money paid under this agreement of May 10, 1894, without being required to execute any release of damages, is really based on the theory that the company was then entitled to a trial trip of the *Indiana*, and that if such trial trip had been held the vessel would have been accepted and the money paid without any supplemental agreement and release of damages. It has already been shown that the company was not entitled to a trial trip in May, 1894, and it necessarily follows that the company was not entitled to deliver the vessel and to receive payment of the reserved percentages. It is true that the Government was entitled to retain this money only for the purpose of securing the completion of the work, as stated in *Quinn* v. *United States* (99 U. S., 30, cited in the Cramp Company's brief, p. 29), but it had an absolute right to retain the money until such completion, and until that time the money did not belong to the company in any absolute sense, and the United States was undoubtedly the legal owner of it.

To say, as the company's counsel do, that "the United States never parted with any of its money," and that "it merely exchanged securities," is to lose

sight of the facts altogether. The United States actually paid out $234,830, which were not at that time due, and the fact that it took security to cover the possible chance of having to call for a repayment in the future, can not change the fact that the money was paid. To contend that a release given in consideration of a payment of money was invalid because the payee also had received a bond of indemnity is as unreasonable as it would be to contend that a mortgage was invalid because the mortgagee had also received the mortgagor's bond for the repayment of the money. Certainly the court will not permit the disadvantage to the Cramp Company of its having to give security, to weigh against the advantage of its receiving the money which it desired to have, any more than the disadvantage to a mortgagor of having to give security would be allowed to weigh against the advantage of his receiving the money borrowed.

The passage from *Fire Insurance Association* v. *Wickham* (141 U. S., 564, 580), cited on page 30 of the Cramp Company's brief, has no bearing upon the present issue. The court there held that in that particular case payment of an insurance loss sooner than the policy required was not a consideration to support a compromise, because the evidence wholly failed to show that the parties so intended, and the right to delay payment could be waived. In the present case there can be no question whatever but that the parties did intend that the payment of the

money before it was due was to be the consideration for the release, for the supplemental agreement expressly provides that "in consideration of such advance payment the party of the first part hereby releases the party of the second part." The company, having executed an agreement stating that the advance payment was the consideration, can not now be heard to say that there is no evidence of consideration.

The contention that the Government never carried out the terms of the agreement of May 10, 1894 (Cramp brief, pp. 30–31), is based upon an incomplete quotation from that agreement, which did not provide that the Government should pay "so much of the aggregate amount of the last three installments of the contract price as will leave," etc., but that it would pay "so much of the aggregate amount of the three last installments of the contract price *and* of the reservations from previous payments as will leave," etc. The sum to be paid was to be taken out of a fund consisting of the last three installments and the reservations from the prior installments, treated as a whole, and it made no possible difference whether the payment was measured by one of the constituent portions of the fund or another. The fact that the amount paid was equal to twenty-three out of the twenty-seven installments already paid is wholly immaterial, as the Secretary of the Navy could have paid whatever amount he thought would leave a reasonable balance in his hands. He chose to pay a

certain multiple of the reserved percentages, but if he had chosen to pay a certain multiple of the last three installments the effect of the payments would have been precisely the same.

The contention that the Secretary had previously paid the Cramp Company less than it was entitled to, and that the payments under the supplemental agreement merely righted that error (Cramp brief, pp. 31–32) is unwarranted by anything in the record. The contract provided that "payments shall be made by the United States in thirty equal installments, as the work progresses, with a reservation of 10 per cent from each installment." The findings show that the contractor had been paid twenty-seven thirtieths of the entire contract price, less the reserved percentages, and the findings do not even suggest that more than these twenty-seven thirtieths had yet been earned. In fact, Finding V (Rec., 19) refers to "the twenty-seven installments earned," implying certainly that no more had then been earned. The fact that the Secretary believed that the retained percentages constituted an unnecessarily large contingent fund merely shows that the contract was not drawn up with more than human foresight, but it can not alter the legal rights of the parties.

The Cramp Company's brief (p. 32) advances the further contention that as the Secretary of the Navy had no authority to pay a claim for damages for breach of contract, therefore he had no authority to procure the release of such a claim by the giving of any

consideration whatever. The contention is ingenious, but can scarcely bear the test of examination. The doctrine that an executive officer has no power to settle a claim for unliquidated damages (as to which see *Brannen* v. *United States*, 20 C. Cls. R., 219) is a highly technical one, apparently based upon the same doctrine of strictly limited authority which prevents the Government from being bound by his unauthorized acts or declarations. (See *Whiteside* v. *United States*, 93 U. S., 247, 257.) This doctrine should not be stretched beyond its proper limits. It prevents an executive officer from destroying in advance any legal defenses which the Government may have to claims against it, and from paying claims which a court might conceivably hold to be legally invalid or excessive, but it does not prevent him from protecting the Government against claims which might possibly be prosecuted against it. If an executive officer, in the exercise of any of his acknowledged powers, can protect the Government against liability to claims, he can do so, even though the claim be one which he would have had no authority to discharge by payment.

The doctrine that an executive officer can not pay a claim for unliquidated damages for breach of contract can not affect his power to make contracts on behalf of the Government, or to change those which he has made, such power having its own particular limits. The contract in the present case (art. 2, Rec., 6–7) provided for the contingency of changes in the work, although such changes might consider-

ably increase the total cost, and it could likewise have provided for the contingency of increased expense to the contractor due to delay in completion. Had the contract not provided for the contingency of changes in the work, it would have been within the power of the Secretary of the Navy to provide for the cost of any such changes by a subsequent modification of the contract, and it would have been equally within his power to make a supplemental contract in regard to such increased expense as the contractor might incur in consequence of delay. Similarly it was within his power to modify the contract as regards the payments, so as to avoid retaining until the vessel was accepted as large a proportion of the consideration money as the terms of the contract required. In so modifying the contract, it was undoubtedly within his power to require some consideration from the contractor in return for such advanced payment, and it can make no difference whether the consideration required was a release of a claim which the Secretary had no authority to pay, or was any other kind of consideration. As long as he had authority to modify the contract, he could certainly use that authority for the purpose of protecting the Government against claims. His act in securing such protection can not be compared to an act which would tend to prevent the Government from protecting itself by any legal defense. It is acts of the latter character, and not of the former, which an executive officer has no authority to perform.

The second reason advanced by the Cramp Company against the validity of the release of May 10, 1894, is that "it was procured under conditions and circumstances that amounted to legal duress" (brief, p. 33). It is difficult to treat such a contention seriously, even apart from the fact that in executing the release the contractor "at the time does not appear to have made any objection or protest" (Rec., 19). The Cramp Company's counsel assume that the delay in the completion of this vessel, and the consequent postponement of the time when the contractor would be entitled to be paid in full, caused the contractor such financial embarrassment that the release given in consideration of the advanced payment made under the agreement of May 10, 1894, was given under duress. As far as concerns the present record this is an assumption pure and simple. There is not a word in the findings to justify it, and it can not be the subject of judicial notice. Undoubtedly the contractor wished to be paid as soon as possible, and if all the money could not be paid in May, 1894, the contractor wished to receive as much of it as he could, for it is not in human nature to wish to postpone the receipt of money when interest is not running upon the claim; but the mere desire to be paid is no evidence of financial embarrassment.

Paragraph XI of the petition (Rec., 3) did indeed state that the Secretary of the Navy refused to permit a trial trip, and also refused to pay the

contractor the money then earned and due to it, in order to take advantage of its financial necessities caused by the delays and defaults of the United States, and coerce the company into releasing its claim, but the findings do not contain a word to substantiate the allegations of financial embarrassment and of coercion, and hence the facts alleged in the petition are simply to that extent not proved, and must therefore be disregarded. The record disclosing no "conditions and circumstances that amounted to legal duress," the contention as to such duress must necessarily fall.

It is therefore submitted that the cross appeal should be dismissed.

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